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Palmer House Hilton and Mohamad Safavi

UNITE HERE, Local 1 and Mohamad Safavi.
Cases 13–CA–44223 and 13–CB–18772

February 12, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On June 27, 2008, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondents each filed exceptions, and the Respondent-Union filed a supporting brief. The General Counsel filed an answering brief to the Respondents' exceptions.

The National Labor Relations Board¹ has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions that the Respondent-Union violated Section 8(b)(1)(A) and (2), and the Respondent-Employer violated Section 8(a)(3), but only for the reasons set forth below,² and to adopt the recommended Order as modified and set forth in full below.³

1. First, we adopt the judge's credibility determinations and rely on the factual account more fully set forth in the bench decision, but described briefly below.⁴

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

² We affirm the judge's conclusions, relying only on the legal principles and precedent cited in this case. We do not rely on the judge's further characterization of the Act or the other cases cited in his decision. In addition, contrary to the Union's claim, we find that the judge did not err by failing to apply *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to determine if the Union violated Sec. 8(b)(2) or the Employer violated Sec. 8(a)(3). Absent evidence that the Union acted with a dual motive in seeking Safavi's discharge, *Wright Line* is not applicable. See *Electrical Workers Local 429*, 347 NLRB 513, 515 fn. 9 (2006), remanded on other grounds 514 F.3d 646 (6th Cir. 2008). Nor was the judge required to apply *Wright Line* to determine if the Employer unlawfully discharged Safavi. Instead, the legal test is whether the Employer had "reasonable grounds for believing" that the Union's discharge request was unlawful. See *Claremont Resort Hotel & Tennis Club*, 260 NLRB 1088, 1093 (1988).

³ We have modified the judge's recommended Order to correct certain inadvertent errors and to conform to the Board's standard remedial language. We have substituted new notices that reflect these changes.

⁴ To the extent that the Respondents have excepted to some of the judge's credibility findings, the Board's established policy is not to

On July 13, 2007,⁵ the Union requested that the Employer terminate on July 20 a number of unit employees, including Mohamad Safavi, if they did not pay their dues or enter into a dues payment plan by that date. Although Safavi did not take the required action prior to July 20, he continued working for the Employer. On July 25, after several unsuccessful attempts, Safavi met with Tara Advani, the Union's office manager. At that meeting, Safavi made an initial dues payment and entered into a payment plan to pay off the remaining amount in arrears over the next 3 months. Advani signed off on this agreement. After Safavi signed the agreement, Advani told him that "just because you made these payments [that does not] mean the hotel is not going to fire you." Advani indicated that the Employer could eventually choose to rehire Safavi in light of his agreement to pay the dues that were owed.

On July 26, Advani sent a letter to Arelis Morales, the Employer's human resources manager, stating that Safavi had entered into a payment plan and was now eligible for "rehire." That same day, Morales contacted Advani and, as relevant here, asked whether it would be appropriate to go forward with the requested termination in light of Safavi's payment, thereby indicating to Advani that Safavi had not yet been discharged. Advani instructed Morales to "hold off" on processing Safavi's termination so she could discuss the matter with Karen Kent, the Union's vice president.

On July 28, when Safavi reported for his scheduled shift, the Employer's secretary asked Safavi for proof that he had paid his back dues. Safavi presented a copy of the payment plan agreement he had signed on July 25. The secretary made a copy of the agreement, and Safavi worked and was paid for the July 28 shift. On July 30, Advani contacted Morales and confirmed that the Employer could process Safavi's discharge. The Employer terminated Safavi on that date.

2. For the following reasons, we affirm the judge's conclusion that the Respondent-Union violated Section 8(b)(1)(A) and (2) of the Act by seeking Safavi's discharge following his partial tender of dues and entry into a dues payment plan on July 25.

The Board has found that, depending on the circumstances, a union may waive its right to pursue the discharge of an employee pursuant to a union-security agreement if, before the requested discharge is actually effectuated by the employer, the union accepts and retains

override an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. We have carefully examined the record and find no basis for reversing the findings. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951).

⁵ All dates are 2007, unless otherwise noted.

a tender of delinquent dues. See, e.g., *Teamsters Local 200 (State Sand & Gravel)*, 155 NLRB 273, 277–278 (1965) (union waived right where it agreed to back dues payment plan with employee and accepted one payment, prior to actual discharge), citing *Colgate-Palmolive Co.*, 138 NLRB 1037 (1962). See also *Claremont Resort Hotel & Tennis Club*, supra at 1093. Under the circumstances here, we find such a waiver. Before Safavi was discharged, the Union accepted a partial payment of Safavi's back dues and entered into an agreement requiring him to make monthly payments until the full amount owed was tendered. Only after Safavi signed the agreement, reasonably believing that it would preserve his job, did the Union tell him that he might still be discharged (although he would be eligible for "re-hire"). Upon learning on July 26 that the Employer had not yet discharged Safavi, the Union then asked the Employer to "hold off" on discharging Safavi, who accordingly worked another shift before the Union successfully renewed its request for Safavi's discharge on July 30. The record thus establishes that Safavi resolved his dues delinquency, to the satisfaction of the Union, before he was actually discharged. Consistent with our case law, these facts support a finding that the Union waived its right to enforce the union-security agreement against Safavi and violated Section 8(b)(1)(A) and (2) by continuing to do so.⁶

3. We also affirm the judge's conclusion that the Respondent-Employer violated Section 8(a)(3) and (1) of the Act by discharging Safavi on July 30 pursuant to the Union's request. An employer violates the Act when it "discharges an employee at the request of the union when it has 'reasonable grounds for believing' that the request was unlawful." *Valley Cabinet & Mfg.*, 253 NLRB 98, 99 (1980), enf'd. 691 F.2d 509 (9th Cir. 1982) (citations omitted). On July 28, Safavi confirmed to the Employer that he had made a partial dues payment and entered into a

payment plan with the Union. In light of this knowledge, when the Union told the Employer on July 30 that it should discharge Safavi, the Employer was required to investigate the circumstances of the Union's renewed discharge request. See *Planned Building Services*, 318 NLRB 1049, 1063 (1995), and cases cited therein. As the Employer failed to do so, we agree with the judge's finding of a violation.

ORDER

A. The National Labor Relations Board orders that the Respondent Employer, Palmer House Hilton, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Encouraging or discouraging membership in UNITE HERE, Local 1, by terminating an employee at the request of the Union in a manner not permitted by Section 8(a)(3) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mohamad Safavi full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Jointly and severally with the Respondent Union, make Mohamad Safavi whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and, within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix A."⁷ Copies of the notice, on

⁶ We reject the Union's claim to the extent it asserts that it did not knowingly waive its right to enforce the union-security clause because it believed the Employer terminated Safavi as of July 20. Even assuming the Union reasonably believed that Safavi was discharged on July 20, the Employer's call to the Union on July 26 to confirm whether it should process Safavi's termination put the Union on notice that Safavi had not yet been discharged.

Further, contrary to the Union's argument, the General Counsel was not required to prove that the Union's discharge request was motivated by some reason other than Safavi's dues delinquency. The Union concedes that dues delinquency was the only reason it requested Safavi's discharge. As discussed above, under the circumstances, the Union waived its right to assert dues delinquency as the basis for Safavi's discharge when it accepted his partial payment of back dues and entry into a payment plan. By establishing that the Union continued to seek Safavi's discharge after waiving its only asserted basis for the discharge, the General Counsel established that the Union violated Sec. 8(b)(2).

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2007.

(f) Post at the same places and under the same conditions as set forth above, as soon as forwarded by the Regional Director, copies of the attached notice marked "Appendix B."

(g) Sign and return to the Regional Director for Region 13, sufficient signed copies of "Appendix A" for posting by the Respondent Union at its business offices and meeting halls, where notices to members are customarily posted.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondent Union, UNITE HERE, Local 1, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause the Employer, Palmer House Hilton, to discharge or otherwise discriminate against Charging Party Mohamad Safavi, or any other employee, in a manner not permitted by Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate Mohamad Safavi to the rolls of the Union in good standing, contingent upon payment of prospective union dues on a monthly basis.

(b) Within 14 days from the date of this Order, notify Palmer House Hilton and Mohamad Safavi, in writing, that it withdraws and rescinds its request for Safavi's discharge, and that it has no objection to his reinstatement

without any loss of seniority or other rights and privileges previously enjoyed by him.

(c) Jointly and severally with Respondent Employer, make Mohamad Safavi whole for any losses suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days after service by the Region, post at its business offices and meeting halls, copies of the attached notice marked "Appendix B."⁸ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth above, as soon as forwarded by the Regional Director, copies of the attached notice marked "Appendix A."

(f) Sign and return to the Regional Director for Region 13 sufficient copies of "Appendix B" for posting by the Respondent Employer at its facility in Chicago, Illinois, where notices are customarily posted.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to steps that the Respondent Union has taken to comply.

Dated, Washington, D.C. February 12, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT encourage or discourage membership in UNITE HERE, Local 1, by terminating an employee at the request of the Union in a manner not permitted by Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Mohamad Safavi full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, jointly and severally with the Respondent Union, make Mohamad Safavi whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge and, within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

PALMER HOUSE HILTON

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT cause or attempt to cause the Employer, Palmer House Hilton, to discharge or otherwise discriminate against Charging Party Mohamad Safavi, or any other employee, in a manner not permitted by Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate Mohamad Safavi to our rolls in good standing, contingent upon payment of prospective union dues on a monthly basis.

WE WILL, within 14 days from the date of this Order, notify Palmer House Hilton and Mohamad Safavi, in writing, that we withdraw and rescind our request for Safavi's discharge, and that we have no objection to his reinstatement without any loss of seniority or other rights and privileges previously enjoyed by him.

WE WILL, jointly and severally with Respondent Employer, make Mohamad Safavi whole for any losses suffered as a result of the discrimination against him, with interest.

UNITE HERE, LOCAL 1

Jeanette Shrand, Esq., for the General Counsel.

N. Elizabeth Reynolds, Esq. (Allison, Slutsky & Kennedy), for the Respondent Union.

Kyle B. Johansen, Esq. (Franczek Sullivan P.C.), for the Respondent Employer.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASES

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on May 14, 2008, in Chicago, Illinois. After the parties rested, I heard oral argument, and on May 15, 2008, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach as "Appendix A," the portion of the transcript containing this decision.¹ The Conclusions of Law, Remedy, Order, and notice provisions are set forth below.

Respondent Union's Estoppel Argument

On May 15, 2008, shortly before I issued the bench decision, the Union submitted a "Motion of Respondent UNITE HERE, Local 1, to Dismiss Complaint Based on Estoppel." Thereafter, the General Counsel submitted a response in opposition. Respondent Union's motion and the General Counsel's response have been considered carefully. For clarity, this discussion of the Union's motion will begin with a review of the relevant facts.

¹ The bench decision appears in uncorrected form at pp. 231–253 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this certification.

For the reasons discussed in the bench decision, I have concluded that Respondent Union violated Section 8(b)(2) of the Act by accepting Charging Party Safavi's belated tender of past dues (even though it was after the specified deadline) but nonetheless continuing to seek his discharge for nonpayment of those dues. Because Safavi tendered the dues after the deadline, the Union had the choice either of refusing to accept the tender and pressing its demand that the Employer discharge him, or of accepting the late tender and abandoning its demand that Safavi be terminated. Under established Board precedent, the Union lawfully could have chosen to do either, but it could not lawfully do both.

However, one fact does complicate the situation described above. Instead of paying the full amount of his dues arrearage, Charging Party Safavi and the Union entered into a "payment plan" and, on the same day Safavi signed this plan, he gave the Union a "down payment" towards the total amount he owed. When other employees had entered into such payment plans, the Union had treated them as sufficient to satisfy the dues obligation. Both Safavi and the Union executed the payment plan agreement, which I concluded was tantamount to tender of the full amount of the dues arrearage.

In other words, if Safavi had entered into the payment plan agreement with the Union before the deadline for paying his back dues, there is no doubt that the Union would have accepted this agreement, along with the down payment, as sufficient, and would have withdrawn its demand for Safavi's discharge. It had done so with other members. Accordingly, I treated Safavi's execution of the payment plan, together with down payment, as having the same effect as a tender of the full amount.

After Safavi learned that the Union persisted in demanding his discharge, he continued to make the payments required by the payment plan. Based on Safavi's testimony at hearing, the Union concluded that a Board agent's advice prompted Safavi to be faithful to the payment plan. The Union argues that the words attributed to the Board agent estop the General Counsel from proceeding in this case. Specifically, the Union's motion states, in part:

At the hearing in this matter on May 14, 2008, the Charging Party was asked on direct examination by Counsel for the General Counsel why he made the payments under the payment plan on August 23, September 23 and October 23, 2007. The Charging Party testified in response . . . that he made the payments because the Board Agent who spoke with him about the instant unfair labor practice charge . . . advised him to do so.

The General Counsel is estopped from proceeding against the Union based on its failure to refund the July 25 payment—in particular, as the General Counsel argued, its failure to offer a refund in response to the filing of the charge—because the Board's agent caused the Charging Party to make a second payment under the payment plan the day after the charge was filed. The charge was filed in this case on August 22, and the Charging Party made an installment payment at the Board Agent's direction on August 23. There would be no conceivable reason for the

Union to respond to the charge by offering a refund of the July 25 payment, when the Charging Party had appeared at the Union office and paid his next installment immediately after filing the charge. The Charging Party's conduct of continuing to make timely payments on the payment plan immediately after filing the charge was consistent with the Union's understanding that Safavi had entered into a payment plan for a lawful purpose and that the Union was entitled to receive payment from him under the plan. The Board Agent's advice to Safavi foreclosed any possibility that the Union might reconsider the propriety of retaining Safavi's payments in light of the filing and investigation of the charge.

The equitable principle of estoppel, recognized by Board law, requires that the complaint be dismissed. See, e.g., *Wise Alloys, LLC*, 347 NLRB No. 117 (2006). *Union-Tribune Publ'g Co.*, 2001 WL 1598680 (ALJ Opinion and Order, July 27, 2001) (where alleged transgression was committed at charging party's request, "General Counsel is estopped from prevailing in a case like this lest a form of entrapment occur.")

The language quoted immediately above suggests that Respondent Union is arguing that the Board agent's purported advice to the Charging Party led to a "form of entrapment." The logic of this argument escapes me.

Before addressing the Union's argument in detail, it may be helpful to examine Safavi's testimony concerning what the Board agent supposedly told him. As the General Counsel's Opposition notes, Safavi quoted the Board agent as saying that it was "better to pay." However, the discussion below does not turn on whether the Board agent told Safavi it was "better to pay" or that he "should pay" or used other words to convey a similar message.

Respondent Union hasn't shown how the statement attributed to the Board agent would be improper in any way. The Union cannot possibly be arguing that the Board agent urged Safavi to pay the Union money which Safavi did not owe. To the contrary, the Union consistently has taken the position that Safavi did owe the money. Moreover, the Union has argued that because Safavi owed the Union the back dues, it could have gone into court and sued him to recover.

Indeed, it appears clear that the Union could have sought to recover the back dues through litigation and could have based such litigation on two separate contractual obligations. First, Safavi incurred a legal obligation by joining the Union and the obligation continued while he was a member of the Union. The Union could go into court to recover the unpaid dues which accrued during Safavi's membership even absent a payment plan agreement.

Moreover, the payment plan agreement itself presumably constituted a legally enforceable agreement. My conclusion that Safavi tendered his back dues by signing the agreement and making a down payment rests on the assumption that it was a legally binding contract which Safavi was obliged to satisfy fully. Thus, the payment plan agreement provided another contractual basis for a lawsuit against Safavi.

Respondent Union has not explained how it would have been improper, in any way, for a Board agent to advise Safavi to pay a debt he legally owed and for which he could be sued. Likewise, Respondent Union has not identified how such advice could possibly constitute “entrapment.”

The logic of the Union’s estoppel theory does not become visible from any angle, except, perhaps, when viewed upside-down. Thus, suppose for the sake of argument that the Board agent had said to Safavi the exact opposite of the words attributed to him. Suppose that the Board agent had told Safavi it was better *not* to make the payments due under his agreement with the Union.

Further suppose, also contrary to fact, that Safavi had followed such hypothetical advice and failed to make the payments. If Safavi had thus defaulted on the payment plan agreement, then, supposedly, the Union lawfully could have continued to seek his discharge.

Or so, apparently, the Union reasons. However, it isn’t necessary for me to speculate about what the Union might lawfully have done if the facts had been different. The issue here concerns the validity of the Union’s argument that what a Board agent supposedly told the Charging Party estops the General Counsel from proceeding. It may be observed with considerable confidence that a Board agent’s failure to give bad advice does not work any kind of estoppel.

Neither does a Board agent’s statement of the obvious, that it is better for a person to pay his debts. Even assuming the Board agent said what Safavi attributed to him, it would not estop the General Counsel from proceeding in this matter. See generally *Christine Kelley v. NLRB*, 79 F.3d 1238 (1st Cir. 1996). Accordingly, I deny the Union’s motion.

The 8(a)(3) and (1) Allegations

In general, Section 8(a)(3) of the Act prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. See 29 U.S.C. § 158(a)(3). When an employer complies with a union’s request to fire an employee because of that person’s failure to support the union in some way, that action powerfully encourages membership in a labor organization. Other employees reasonably would hasten to support the union after seeing what happened to their fellow worker who did not.

A proviso to Section 8(a)(3) carves out a narrow exception allowing an employer and a union which is the exclusive bargaining representative to enter into a collective-bargaining agreement requiring union membership as a condition of employment. Other provisions limit this exception. For example, union membership cannot be required for the first 30 days of employment (a shorter period applies in the construction industry, see 29 U.S.C. § 158(f)) and union membership cannot be required where prohibited by State or territorial law. See 29 U.S.C. § 64(b).

Significantly, when a union demands that an employer discharge an employee, the Board doesn’t routinely assume that the union’s conduct somehow falls within the exception to the rule. Such an assumption would vitiate the protections of Section 7, and the Board takes precisely the opposite approach.

Under established Board precedent, “whenever a labor organization ‘causes the discharge of an employee, there is a rebuttable presumption that [the labor organization] acted unlawfully because by such conduct [it] demonstrates its power to affect the employees’ livelihood in so dramatic a way as to encourage union membership among the employees.’” *Acklin Stamping Co.*, 351 NLRB 1263 (2007); citing *Graphic Communications Local 1–M (Bang Printing)*, 337 NLRB 662, 673 (2002).

A union’s successful effort to cause a discharge necessarily begins with a request or demand, and that initial request or demand constitutes part of the union’s conduct which enjoys no presumption of legality. Accordingly, such a request does not arrive at the employer’s office stamped indelibly with the words “presumed lawful.”

When an employer receives such a discharge request from a union representing its employees, three factors militate in favor of caution. First, by seeking an employee’s discharge, the union is urging the employer to act in a manner which would be unlawful *unless it happened to fall within the statute’s narrowly-crafted exception*.

Second, should the union be seeking the employee’s discharge for any reason except the one allowed by the narrow statutory exception, the employer’s compliance with this request will result in significant exposure to liability under the Act.

Third, the employer’s knowledge of the union’s true motive may be limited or nonexistent. In most 8(a)(3) discharge cases, an employer’s *own* motivation plays the crucial role in determining liability. An employer can avoid committing an unfair labor practice by making sure that improper considerations did not enter into the decisionmaking process. Managers obviously know their own true reasons for deciding to discharge someone and, if those motives are tainted, they can stop before acting. However, the managers do not have similarly intimate access to the minds of the union officials who send a discharge request.

In drafting the Act, Congress stopped short of requiring managers to be mind readers. If a union requested the discharge of a bargaining unit employee ostensibly for the lawful reason—the employee’s failure to pay the regular and uniform dues—and the employer had no reasonable way of knowing that the union’s real reason was otherwise, then the employer would not violate Section 8(a)(3) if it complied with the discharge request.

Congress actually worded this “escape clause” in a slightly different way, making it unlawful for the employer to discharge an employee if the employer *does have* a reasonable basis for doubting the union’s ostensibly legal reason. The exact language appears in Section 8(a)(3), in two provisos which immediately follow the exception allowing the discharge of an employee for failing to maintain union membership:

Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable

grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

That standard—“reasonable grounds for believing”—will be applied here in determining whether Respondent Employer violated the Act by carrying out the Union’s discharge request. An “or” separates the two provisos and the General Counsel does not have to prove both. Here, I will focus particularly on proviso (B), examining the evidence to determine whether Respondent Employer had reasonable grounds for believing the Union had denied or terminated Safavi’s membership “for reasons other than the failure . . . to tender the periodic dues . . . uniformly required as a condition of . . . retaining membership.”

For the reasons stated in the bench decision, I have concluded that Safavi remained an employee of Respondent Employer until the Union notified the Employer on July 30, 2007, that it could go ahead and “process” the discharges. The record establishes that by this date, when the Employer terminated Safavi’s employment, it already knew that Safavi had entered into a payment plan with the Union to satisfy his dues obligation.

Safavi credibly testified that when he went to work on July 28, 2007, he spoke with a secretary who asked whether he had proof that he had paid his union dues. He showed her the payment plan agreement and the secretary made a copy of it. Based on this credited testimony, I find that 2 days before the Employer discharged Safavi it had notice that he had satisfied the dues obligation.

The testimony of Respondent Employer’s human resources manager, Arelis Morales, also establishes that the Employer knew of Safavi’s payment plan agreement with the Union before it discharged him on July 30, 2007. Four days earlier, Morales had telephoned the Union’s office manager, Tara Advani, concerning the Union’s letter requesting the discharge of certain employees, including Safavi. On cross-examination, Morales admitted that during this July 26, 2007 conversation Advani had informed her that Safavi had executed a payment plan:

Q. BY MS. REYNOLDS: Good afternoon, Ms. Morales. In your conversation, your first conversation with Tara Advani on July 26th, Ms. Advani said to you that Mr. Safavi has signed a payment plan, but that she did not, she had not received it back from him, correct?

A. Right.

Q. And, so why was Mr. Safavi terminated by the hotel?

A. Because the Union dues were not paid or brought up to date with the Union.

Q. By any particular time?

A. By the 20th of July.

Based on this testimony by Respondent Employer’s human resources manager, I conclude that before the Employer discharged Safavi on July 30 it knew that Safavi had entered into a payment plan with Respondent Union. (Indeed, as noted

above, Safavi’s credited testimony establishes that the Employer received a copy of this plan on July 28, 2007.) Notwithstanding this knowledge that Safavi had executed the payment plan, the Employer discharged Safavi because his union dues had not been paid by July 20.

Although the record clearly establishes that the Employer discharged Safavi after it had learned that he had entered into the payment plan, it remains unclear whether the Employer also knew that the Union had accepted and retained Safavi’s initial payment under the plan. The payment plan itself bears the handwritten notation “\$100.00 today,” and the Employer received a copy of the plan 2 days before it discharged Safavi. That “\$100.00 today” notation certainly suggests Safavi made a payment, but it falls short of stating that the Union *received* \$100 from Safavi. No evidence establishes conclusively that the Employer knew Safavi had tendered \$100 as the first installment under the payment plan and that the Union had accepted the money.

To prove that the Union violated Section 8(b)(2) as alleged, the General Counsel had to establish that the Union received and kept Safavi’s tender. However, because of the “reasonable grounds for believing” standard, the General Counsel can establish the alleged 8(a)(3) violation without having to prove that Respondent Employer knew for a fact that the Union had held onto Safavi’s payment.

The record suggests that it was a common practice for the Union to enter into payment plans with employees who owed past dues. No evidence suggests that the Union had a practice of agreeing to a payment plan and then refusing the employee’s tender of payment or of accepting it and then giving it back later.

It would not be logical for the Union to enter into a payment plan with a member if it had no intention of accepting and keeping the payment. Indeed, it would make no sense at all for the Union to sign a binding legal document to which it did not intend to be bound. Likewise, it would defy common sense for the Union to agree that a member could make payments while harboring a private intention of not accepting such payments.

Respondent Employer had no reason to believe that the Union would not accept the payment it had sought. Therefore, I conclude that the Employer reasonably would believe that both Safavi and the Union would conform to the terms of their agreement.

In sum, Respondent Employer had reasonable grounds to believe that the Union was continuing to demand the discharge of Safavi even after he had satisfied his dues’ obligation in a manner similar to that which other employees had used, and to which the Union had agreed. Because the Union persisted in seeking Safavi’s discharge even after the back dues’ problem had been solved, the Employer had reasonable grounds to believe that the Union must have some other impermissible motivation.

The Union declared that Safavi was not a member in good standing. However, if he was not a member in good standing even after he had tendered, and the Union had accepted, his back dues, then logically, the termination of his membership must have been for some reason “other than the failure of the employee to tender the periodic dues.” Respondent Employer

did not have to know this actual reason. Respondent Employer only had to have reasonable grounds for believing it existed.

Because I conclude that Respondent Employer had reasonable grounds for believing that Safavi's membership had been terminated for some reason other than the failure to tender his periodic dues, I further conclude that the Employer acted unlawfully in discharging him. Therefore, I recommend that the Board find that Respondent Employer violated Section 8(a)(3) and (1) of the Act, as alleged.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees and members attached as appendix B.

Additionally, Respondent Employer must offer Mohamad Safavi immediate and full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position.

The Respondent Union must notify both the Respondent Employer and Charging Party, in writing, that it does not object to the Charging Party's reinstatement, without loss of seniority or other rights and privileges, and has fully withdrawn its previous objection to the Charging Party's employment.

Both Respondent Employer and Respondent Union bear responsibility for making Safavi whole, with interest, for all losses he suffered because of the unfair labor practices the Respondent's committed.⁹ However, Respondent Union's backpay liability will be tolled 5 days after it notifies Respondent Employer and Charging Party Safavi, in writing, that it has no objection to Safavi's reinstatement. *Grassetto USA Construction*, 313 NLRB 674 (1994).

CONCLUSIONS OF LAW

1. The Respondent Employer, Palmer House Hilton, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Union, UNITE HERE, Local 1, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Employer encouraged membership in a labor organization by discriminating in regard to the tenure of employment and terms and conditions of employment of employee Mohamad Safavi, by discharging him on July 30, 2007, thereby encouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act. Thereafter, Respondent continued to discriminate against Safavi in violation of Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate him.

4. On or about July 30, 2007, Respondent Union attempted to cause, and did cause, Respondent Employer to discharge employee Mohamad Safavi notwithstanding that membership in Respondent Union had been denied or terminated on some ground other than his failure to tender the periodic dues and the

initiation fees uniformly required as a condition of acquiring or retaining membership.

5. Respondent Union, by the conduct alleged in paragraph 4 above, violated Section 8(b)(2) and Section 8(b)(1)(A) of the Act.

6. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondents did not engage in any unfair labor practices alleged in the consolidated complaint not specifically found herein.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended¹⁰

ORDER

A. The Respondent, Palmer House Hilton, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Encouraging or discouraging membership in a labor organization by discharging an employee, or otherwise discriminating against an employee in regard to hire or tenure of employment or any term or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Mohamad Safavi immediate and full reinstatement to his former position or, if his former position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and expunge from his personnel file all references to his discharge.

(b) Make Mohamad Safavi whole, with interest, for all losses he suffered because of his unlawful discharge.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Chicago, Illinois, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to

⁹ Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondent, UNITE HERE, Local 1, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause the Employer, Palmer House Hilton, to discharge or otherwise discriminate against employee Mohamad Safavi, or any other employee, for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Employer, Palmer House Hilton, and the Charging Party, Mohamad Safavi, in writing, that it has no objection to the employment of Mohamad Safavi and requests that the Employer reinstate him.

(b) Make Mohamad Safavi whole, with interest, for all losses suffered because the Union unlawfully requested his discharge and because the Employer unlawfully complied with this request. Respondent Union's obligation to make Safavi whole shall be subject to the limitation set forth in the remedy section of this decision.

(c) Post at its facility in Chicago, Illinois, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix C."¹² Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D.C., June 27, 2008.

APPENDIX A

BENCH DECISION

After accepting an employee's belated tender of back dues required by a lawful union-security clause, a union continued

to seek the employees discharge. The Union thereby violated Section 8(b)(1)(A) and 8(b)(2) of the Act, and the Employer which granted the union's request thereby violated Section 8(a)(1) and 8(a)(3) of the Act.

Procedural History

This case began on August 22, 2007, when the Charging Party, Mohamad Safavi, an individual, filed his initial charge against the Respondent Employer, Palmer House Hilton, in Case 13-CA-44223, and his initial charge against Respondent Union, UNITE HERE Local 1, in Case 13-CB-18772. The Charging charges.

On November 30, 2007, after investigation of the charges, the Regional Director for Region 13 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

On May 14, 2008, a hearing opened before me in Chicago, Illinois. Also on May 14, after the parties had presented evidence, counsel argued the case orally. The General Counsel and Respondent Union also submitted prehearing briefs.

Today, May 15, 2008, I am issuing this bench decision pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

Admitted Allegations

Based upon the admissions in the Respondents' Answers and stipulations received at the hearing, I conclude that the General Counsel has proven the allegations raised in Complaint paragraphs I(a), I(b), I(c), I(d), II(a), II(b), II(c), III, IV(a), IV(b), V(a), V(b) and V(c).

Overview of the Facts

At all material times before his discharge, Charging Party Safavi worked for Respondent Employer as a server, in a bargaining unit represented by Respondent Union. Because of a lawful union-security clause in collective bargaining agreements between the two Respondents, Safavi was required, as a condition of employment, to pay certain specified periodic dues. He fell behind in this obligation, and, as of July 25, 2007, owed the Union more than \$800.

The Union sent Safavi notices informing him that if he did not pay the arrearage or enter into a payment plan by July 20, 2007, it would seek his discharge pursuant to the union-security clause. Safavi did not make such a payment or agree to such a payment plan before the July 20 deadline.

For reasons to be discussed later, I credit Safavi's testimony. Based on it, I find that on at least two occasions before the deadline, he went to the Union offices and tried to see the Union's office manager, Tara Advani, who was responsible for collecting the back dues. However, he did not see her on either occasion.

After the July 20 deadline, and before Safavi met with the Union's business manager on July 25, the Union told the Employer to discharge him. Safavi met with the business manager on July 25, entered into a payment agreement

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

acceptable to the Union, and paid the Union \$100 towards his back dues.

The testimony of Safavi and Advani conflicts regarding what Advani told him before he signed the payment plan agreement. Advani testified that she informed Safavi that his signing of the agreement would not result in the Union dropping its demand that the Employer discharge him. However, Safavi emphatically testified that neither Advani nor any other Union representative told him, before he signed the agreement, that the Union would persist in seeking his termination.

Crediting Safavi for reasons discussed later in this decision, I find that neither Advani nor other Union representative informed him, before he signed the agreement, that it would not result in the Union withdrawing its discharge demand.

On July 26, 2007, Office Manager Advani sent the Employer's human resources manager a letter stating "Please be advised that Mohamad Safavi is eligible for rehire—he has made a payment plan to bring his dues account current. . ."

In other words, the Union was stating that if the Employer wished to employ Safavi, it would have to hire him again, resulting in the loss of his seniority. Presumably, Safavi would also have to pay another Union initiation fee.

The Union's letter, however, ignored one fact. Safavi continued to work for the Employer. The evidence establishes the Union's knowledge of this fact because, on July 26, it told the Employer to put processing of the terminations on "hold." Then, on July 30, the Union notified the Employer it could go ahead with processing the terminations. For reasons discussed later in this decision, I conclude that the Respondent Employer discharged Safavi on July 30, and not earlier.

Further Discussion of Disputed Facts

Because the case turns on credibility, it is appropriate to examine the facts in greater detail, even if it entails some repetition.

1. What Was Safavi Told Before Signing the Payment Plan?

The Union contends that before Safavi signed the payment plan, the Union told him that he could not be reinstated, that the Union would only notify the Employer that he was eligible for rehire as a new employee, and that it was up to the Employer whether to rehire him or not. The Union's argument rests on the testimony of Tara Advani, the Union's office manager. However, I do not credit that testimony, which conflicts with Safavi's in a number of important areas. To the extent that Advani's testimony conflicts with Safavi's, I credit the latter.

On July 25, 2007, Safavi signed an agreement, also signed by Advani, requiring him to pay the Union a total of \$882.00 in the following way: That day, Safavi paid the Union \$100. He also obligated himself to pay the Union \$260.80 on August 25, 2007, again on September 25, 2007, and again on October 25, 2007. Additionally, the payment agreement obligated him to pay monthly dues of \$37.60. In other words, each month for 3 months, Safavi had to pay a total of \$298.40.

It is difficult, indeed next to impossible, to believe that Safavi would have signed an agreement obligating himself to pay these substantial amounts if he had first been told that he would not be allowed to keep his job if he signed. The testimony makes clear that Safavi already felt the Union was

not providing service equal to the dues charged for it. Likewise, the record indicates that Safavi was not shy about standing up for his interests. My observations of his demeanor persuaded me that he wasn't likely to mince words if he believed someone was taking advantage of him.

It would seem quite out of character for Safavi to be told that signing a document obligating him to pay upwards of \$1,000 would not result in the Union withdrawing its demand that he be discharged and for him not to react to that. In fact, I find it nearly impossible to believe. Therefore, crediting Safavi, I find that neither Advani nor any other Union official told him, before he signed the plan, that he could not keep his job because of it.

2. What Did Safavi Reasonably Believe?

It isn't necessary for me to decide whether—to borrow a phrase used by counsel during oral argument—the Union was playing a game of "gotcha" and set out to trick Safavi. The Complaint doesn't raise such an allegation. However, I do conclude that Safavi signed the payment plan while reasonably believing that doing so would result in the Union's allowing him to retain his job.

The Union argues that the payment plan resulted in other benefits. However, the credited evidence does not indicate that Advani or any other Union official tried to "sell" the payment plan to Safavi, that is, tried to convince him to sign it, by extolling such other benefits.

In sum, I conclude it was reasonable for Safavi to believe that signing the plan would result in the Union abandoning its request to discharge him.

3. When Did Safavi's Employment Terminate?

The record leaves little doubt about some of the material facts. Uncontradicted evidence establishes that the Union sent Safavi written notices informing him that he owed back dues in specified amounts, and stating that the Union would request his discharge if he didn't these amounts, or arrange a payment plan, by July 20, 2007.

The Union's prehearing brief correctly predicted that the evidence would establish that "Safavi entered into a three-month payment plan with the Union for his delinquent dues on July 25, five days after the deadline."

The credited evidence also supports certain other findings anticipated by Union's prehearing brief. Thus, the Union's brief stated, "The Hotel contacted the Union's Office Manager on Thursday, July 26 and inquired whether it was all right to process the terminations of Safavi and the other employees. . . ." Further, the Union's brief stated that "The Union's Office Manager told the Hotel to hold off on processing the terminations. . . ." Moreover, the brief stated that "On Monday, July 30 the Union notified the Hotel that it could process the terminations of Safavi and the others."

Based on the record, I find that Safavi was still an employee of Respondent Employer when he entered into a payment plan with the Union on July 25, 2007. I find that on the following day, July 26, the Union's Office Manager did tell the Employer to "hold off on processing the terminations" and that on July 30, the Union notified that hotel that it could "process" the terminations.

These findings, however, contradict the Union's suggestion that Safavi *already* had been discharged at the time he signed the payment plan on July 25. Likewise, these findings cast doubt on the Union's claim that on July 25, "At the time when the payment plan was made, the Union believed in good faith that Safavi had already been terminated by the hotel on July 20."

Sometimes, when labor lawyers are in a mood to speak figuratively, they will refer to discharge as being the industrial equivalent of the death penalty. Such an analogy may be instructive here.

Suppose, for example, that after a convict is moved to death row, a court orders the warden to "hold off on processing" the death warrant while the court considers the convict's appeal. Suppose further that the court ordered this stay of execution on July 26. Then, four days later, the court decides the appeal lacks merit and tells the warden that he can "process" the death warrant. In other words, the court lifts the stay and allows the execution to proceed.

Could anyone seriously argue that the convict is already dead on July 26 because the death warrant already had been signed? That would certainly be a surprise to the convict. Likewise, it is impossible to conclude that the Employer discharged Safavi on July 20 when, as the Union's brief itself states, on July 26 the Employer asked the Union if it was all right to "process the terminations of Safavi" and the other employees. Obviously, the Employer would not have asked that question if Safavi already had been fired.

Moreover, the Union's response, instructing the Employer to "hold off," undermines its assertion that it believed, in good faith, that Safavi already had been discharged. By analogy, would a judge issue a stay of execution if he believed, in good faith, that the prisoner already had been executed?

Thus, the facts asserted by the Union cast considerable doubt on the Union's argument. The addition of one other fact topples it completely. Safavi worked for the Employer on two different days after the July 20 deadline. One of those days came before the Union's July 26 instruction to "hold off on processing the terminations" and the other came after that instruction. Far from figuratively being dead, Safavi was alive and well and working. The Employer didn't "throw the switch" on Safavi's employment until July 30.

The Union attaches significance to language on the discharge memorandum that it was effective July 20. Returning for a moment to the death penalty analogy, suppose the warden told the prisoner, "I'm executing you right now effective last Monday." If the coroner heard the warden make that statement, would it change the date of death recorded on the death certificate?

In sum, I find that the Union asked the Employer to "hold off" and that accordingly the Employer did not discharge Safavi until July 30. Further, I find that the Employer then terminated Safavi's employment because the Union stated that it was all right to "process the terminations."

This instruction reactivated the Union's earlier request that Safavi be discharged and thus itself was tantamount to a discharge request. Clearly, when the Union gave the Employer this instruction on July 30, it already knew that Safavi had

entered into a payment plan because the Union itself was a party to that agreement.

The Union asserts that such payment plans are legal obligations enforceable by lawsuit in small claims court. The Union recognizes the signing of such a legally binding document, accompanied by payment of part of the arrearage, as sufficient tender, and indeed, the dues delinquency notices which the Union sent to Safavi specifically mentioned the option of entering into a payment plan rather than paying the full arrearage in one lump sum.

Accordingly, I conclude that on July 30, when the Union effectively renewed its request for Safavi's discharge, the Union already knew that Safavi had satisfied his dues obligation. Such knowledge rules out the possibility that the Union acted against Safavi on July 30 because he had failed to tender the periodic dues required as a condition of retaining union membership. He had already done so and the Union, as a party to the payment plan, knew it.

The Union argues that the General Counsel must do more than simply show that the Union acted for some reason other than a member's failure to tender the periodic union dues. Thus, in its prehearing brief, the Union argued, "Unless the General Counsel can show that the Union harbored some unlawful reason for pursuing the discharge—a reason other than Safavi's failure to pay his delinquent dues by the July 20 deadline—there is no violation. There is no such evidence."

In effect, the Union's argument would impose upon the General Counsel a burden not unlike that implicit in proving a Section 8(a)(3) violation, namely, the requirement of establishing, either by direct evidence or by inference, that a specific unlawful intent was a motivating factor. To determine whether Section 8(b)(2) requires similar proof of intent, it is appropriate to begin by examining the statutory language.

Section 8(b)(2) provides that it shall be an unfair labor practice for a Union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ." 29 U.S.C. Section 158(b)(2).

This language provides two separate bases for finding a Section 8(b)(2) violation. First, it makes it unlawful for a Union to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3). The Union's argument—that establishing an 8(b)(2) violation requires the government to prove an unlawful motive—makes sense in this context, because proving an 8(a)(3) violation requires proof of unlawful motive.

However, Section 8(b)(2) describes a second type of violation which does not refer to Section 8(a)(3). After the word "or," the statutory language goes on to make it an unfair labor practice for a union to cause an employer "to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the

initiation fees uniformly required as a condition of acquiring or retaining membership. . .”

In other words, the “or” signifies that Congress was establishing two separate ways in which a Union could violate this section of the Act. It follows that each of these alternatives has its own requirements, and that the elements required to establish one type of 8(b)(2) violation differ from those necessary to prove the other.

The statutory language describing the second type of violation does not require proof that a union caused or tried to cause an employer to violate Section 8(a)(3). Stated another way, it does not require proof that a union caused an employer to encourage or discourage union membership by discriminating in terms and conditions of employment, which is the unfair labor practice prohibited by Section 8(a)(3).

Rather, the second type of 8(b)(2) violation only requires proof that a union caused an employer “to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues. . .” This careful language does not refer to a union’s intent in causing an employer to discriminate. Rather, it describes a class of employees which this particular section of the Act protects. A union places an employee in this class by denying or terminating his or her union membership for a reason other than failure to tender periodic dues and initiation fees.

This analysis of the statutory language leads me to conclude that to establish the second type of Section 8(b)(2) violation, the General Counsel must prove two things. The government must prove that a union has caused or tried to cause an employer to discriminate against an employee. Also, the government must prove that the Union has denied or terminated the employee’s membership for a reason *other than* the failure to pay the periodic dues and initiation fees.

In a sense, the statutory language appears to place on the General Counsel the burden of proving what the Union’s motivation was *not*, rather than what it was. In the present case, the record clearly establishes that the Union has denied Safavi union membership. In fact, the Union admits that Safavi is not a member in good standing. Based on the credited evidence, I further conclude that the General Counsel has proven that, at the time the Union sought Safavi’s discharge on July 30, it had denied him such membership for reasons other than the failure to tender his dues. That conclusion flows from the fact that Safavi already had tendered the dues by entering into the payment plan.

4. Applicable Case Precedent

The General Counsel and Respondents differ concerning which Board precedent should be applied. The General Counsel cites *Colgate-Palmolive Co.*, 138 NLRB 1037 (1962). Respondent Union, however, argues that *General Motors Corp.*, 134 NLRB 1107 (1961), states the applicable legal principles.

The present facts bear a marked similarity to those in *Colgate-Palmolive*, and I conclude that it is more apposite. It presents squarely the central issue in this case, whether the Union may lawfully accept the tender of back dues while

continuing to seek the employee’s discharge. Moreover, because *Colgate-Palmolive* is the more recent case, its principles will control.

The General Counsel cites *Colgate-Palmolive* for the proposition that a union cannot both accept a member’s tender of past dues and continue to request that the employer discharge him. Respondent Union counters that the principle relied upon by the General Counsel comes from a plurality opinion, signed by only two of the five Board members, and therefore provides shaky support for the proposition. Thus, the Union’s prehearing brief stated, in part (with citations omitted) as follows:

In finding a violation in *Colgate-Palmolive*, the deciding vote, Member Fanning’s concurrence, relied heavily on facts unique to that case. As he discussed in his concurring opinion, after paying her delinquent dues the employee was required to appear at a hearing before a union committee to seek restoration to membership in good standing. . . The committee apparently had discretion [to] approve or deny the employee’s request, and it was the employer’s practice to abide by the union committee’s decision. . . The concurring opinion therefore concluded that “under the practice of the parties, the union-security clause in the contract has been administered to require, not only the payment of dues, but also the maintenance of membership in good standing in the Union as a condition of employment” . . . Thus. . . the enforcement of the union security clause was not based on whether the employee made the required dues payments, but on whether the union chose in any given case to restore the employee to membership after the delinquency was repaid. In the present case, by contrast, the Union acted based solely on whether the employees cured their dues delinquencies by the July 20 deadline.

The Union’s brief accurately describes an important distinguishing fact. However, in my view, Member Fanning’s concurring opinion does not reject the principle that a union may have its cake, as it were, by continuing to seek the employee’s discharge, or may eat the cake by accepting the post-deadline tender of the dues, but it may not do both. Indeed, Member Fanning’s concurring opinion concludes as follows:

The Act permits a union, which has obtained a valid union-security provision in its contract, to demand either an employee’s dues payment or his job. It does not give it the right to demand both.

Colgate-Palmolive Company, 138 NLRB at 1043. Thus, in *Colgate-Palmolive*, a majority of the Board, and not just a plurality, supported this principle.

Although the Board’s *Colgate-Palmolive* decision is almost 50 years old, counsel have not cited any case overruling it and my own research has found none. Accordingly, I conclude that it remains good law.

Respondent Union also seeks to distinguish *Colgate-Palmolive* by arguing that in the present case, “the Union’s office manager expressly told Safavi that paying his dues would

not result in his being reinstated to his job,” and did so before Safavi signed the payment plan agreement. However, Respondent bases this argument on the testimony of Office Manager Advani, which I have not credited. To the contrary, crediting Safavi’s testimony, I find that no Union agent or representative informed him, before he signed the payment plan, that the Union would continue to seek his discharge.

Additionally, I have credited Safavi, rather than Advani, concerning the dates on which he visited the Union’s offices and what occurred when he did. Thus, I find that at least twice before the July 20 deadline, Safavi came to the Union’s offices, spoke with the receptionist, Vera Manning, and unsuccessfully requested to see Office Manager Advani.

Respondent Union did not call Manning as a witness, and nothing in the record contradicts Safavi’s testimony concerning his conversations with Manning. The Union had the opportunity to call Manning during its case in chief, and it also could have called her as a rebuttal witness to respond to the testimony Safavi gave on rebuttal. However, the Union did not call her, and did not assert that she was unavailable as a witness. No credited evidence would support a finding that Safavi failed to come to the Union office before the July 20, 2007 deadline had passed and, likewise, no credited evidence supports a finding that Advani or any other Union representative informed Safavi, before he signed the payment plan, that the Union would continue to seek his discharge.

Respondent Union also relies upon Advani’s testimony in arguing that other cases should be distinguished. Respondent cites these cases (as distinguishable): *Teamsters Local 200 (State Sand & Gravel Co.)*, 155 NLRB 273 (1965), *Cramp Shipbuilding & Drydock Co.*, 151 NLRB 504 (1965), *UAW Local 1772 (Kuhlman Electric Co.)*, 210 NLRB 798 (1974), and *Larkins v. NLRB*, 596 F.2d 240, 247 (1979), in connection with its argument that the Union’s decision to keep the money Safavi tendered did not waive its right to pursue his discharge.

In its prehearing brief, the Union argues that “the Board and the Seventh Circuit looked to the union’s subjective understanding and intent in order to determine whether its handling of the belated tender waived its right to enforce the union security clause.” The Union thus asserts that a finding that a union has waived its right to seek an employee’s discharge must be based squarely on the facts of the case.

However, the credited evidence in the present case does not favor the Union’s argument. To the contrary, the credited evidence establishes that the Union knew, or reasonably should have known, that Safavi was still an employee of Palmer House Hilton on July 25, 2007, when he entered into the payment plan agreement. Indeed, the Union’s own brief describes a telephone call the Employer made to the Union the next day, asking whether the Employer should proceed with the requested discharges. It also refers to the Union’s answer, that the Employer should “hold off” for the time being. Four days later, when the Union told the employer to proceed with the discharges, it clearly had knowledge that Safavi remained an employee at the time he signed the payment plan agreement. The credited evidence hardly provides a basis for distinguishing the cited cases.

Although counsel, and some of the case precedents, use the term “waiver,” the term “election” may be more apt. The principle that a union may not have its cake and eat it, too—that is, may not accept a member’s belated tender of past dues and also continue to request his discharge—would appear to reflect a policy choice arising from basic notions of fairness.

Indeed, it may be reasoned that the General Counsel need not invoke either the principles of waiver or election to establish a violation. A literal reading of Section 8(b)(2) would suggest that it is unlawful for a union to attempt to cause the discharge of an employee except upon the ground that he had failed to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. Once this lawful reason ceases to exist, it may be argued, a union’s continued effort to cause the discharge necessarily must be for some impermissible reason.

In other words, it may be assumed that a labor organization, which exists to represent employees, would not seek the discharge of an employee for no reason at all. The absence of a permissible reason gives rise to an inference of an impermissible one. Or so it might be argued.

Even assuming that the government must establish that the Union waived its right to seek Safavi’s discharge, and assuming further that a finding of waiver turns on facts about a union’s knowledge and/or intent, as the Union argues, the credited evidence fully supports a conclusion that the Union’s acceptance of Safavi’s dues tender waived its right to pursue his discharge.

5. Respondent Union’s Estoppel Argument

During the hearing yesterday, Respondent Union raised for the first time the argument that the conduct of the General Counsel’s agents estop the government from proceeding. Today, shortly before the hearing began, the Union’s counsel submitted a memorandum on this issue. So that it may be given careful consideration, I will address the estoppel argument in the Certification of Bench Decision.

Summary

In sum, I conclude that Respondent Union violated Section 8(b)(2) and 8(b)(1)(A) by seeking and causing the discharge of Safavi after accepting and keeping his tender of back dues.

Respondent Employer had sufficient reason to question the legitimacy of the Union’s discharge request based upon the conversations between the Union’s business manager and the Employer’s human resources director. Moreover, the Charging Party also communicated with the Employer.

I conclude that Respondent Employer violated Section 8(a)(3) and (1) of the Act by discharging Safavi at the Union’s request.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout the hearing, I have been very impressed with the quality of all counsel’s advocacy and even more so, with the

high degree of professionalism and civility that has consistently been shown. Now, I appreciate that very much.

The hearing is hereby closed.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the Act.

WE WILL NOT encourage membership in a labor organization by discharging or otherwise discriminating against an employee, notwithstanding that a labor organization has requested that we discharge the employee for nonpayment of dues, if we have reasonable grounds for believing that membership was not available to the employee on the same terms and conditions generally applicable to other members, or for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Mohamad Safavi immediate and full reinstatement to his former position, or to a substantially equivalent position if his former position no longer is available, and WE WILL make him whole, with interest, for all losses he suffered because of our unlawful discrimination against him.

PALMER HOUSE HILTON

APPENDIX C

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of the Act, or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

WE WILL NOT accept and retain a member's tender of back dues and/or initiation fees but nonetheless request that an employer discharge this member for nonpayment of such dues and/or initiation fees.

WE WILL NOT, in any like or related manner, restrain, or coerce employees in the exercise of rights guaranteed by the Act.

WE WILL provide written notice to Mohamad Safavi and to his employer, Palmer House Hilton, stating that we do not object to his employment and requesting that the employer reinstate him.

WE WILL make employee Mohamad Safavi whole, with interest, for all losses he suffered because we unlawfully requested that his employer discharge him.

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